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Region 21

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Division of Advice

GS Roofing Products Company,		
Cases	21-CA-31212	177-7067-6700
	21-CA-31240	177-7067-6750
	and	524-5079-4200
Warehouse Processing and Distribution		524-5079-4250
Workers Union, Local 26, ILWU,		524-5079-4250
(GS Roofing Products Company)		524-5079-4250
Case 21-CB-12130		530-6067-6001-5600
		530-6067-6001-6200
		530-6067-6001-8700
		554-1467-0100

These cases were submitted for advice regarding:

(1) whether a strike should be characterized as an unfair labor practice strike notwithstanding the fact that the evidence which could establish that the strike was a ULP strike was belatedly provided by the Union,

(2) whether the Union made an unconditional offer to return to work, and

(3) whether the Union's request for information constitutes bad faith bargaining under Section 8(b)(3) of the Act.

FACTS

BACKGROUND

Cases 21-CA-30760, 30791, 30802 & 21-CB-11973 (First Series of Charges)

Warehouse Processing and Distribution Workers Union, Local 26, ILWU (the Union) has had a collective bargaining relationship with the GS Roofing Products Company (the Employer) for four to six years and with the Employer's predecessors for about 40 years. The last collective

bargaining agreement between the parties was effective through June 30, 1995.

The parties met six times in June 1995 to bargain for a successor contract. The Employer informed the Union that it intended to automate the plant and reduce the workforce over the next couple of years and combine jobs in the process; the result would be the layoff of a number of employees. On June 12, 1995, the Union requested job descriptions of the current positions and descriptions of the newly-proposed jobs. Ultimately, the Employer provided job descriptions of the newly-proposed jobs but refused to provide job descriptions of the current positions. The Union filed a charge in Case 21-CA-30791, alleging this refusal to provide information as violative of Section 8(a)(5) of the Act. Also, on June 15, 1995, during bargaining, the Union requested that the Employer cease its "maintenance ownership program," a program which required, among other things, that maintenance employees train production workers to perform maintenance work. The Employer had implemented this program without bargaining with the Union, and on June 16, the Union filed a Section 8(a)(5) charge, in Case 21-CA-30760, against the Employer attacking the unilateral implementation.

On June 30, 1995, the Employer proposed its last and final offer, a two-year extension of the existing contract which included a two-year wage freeze. According to the Union, a membership meeting was held on July 1, 1995, at which two secret ballot votes were taken. The membership first voted, 44-11, not to accept the Employer's last and final offer. Next, the Union asserts that in another secret ballot vote the membership voted unanimously to go out on an unfair labor practice strike because the Employer had failed to provide some of the information noted above and because the Employer had unilaterally implemented the "team concept" in the maintenance department, i.e., the "maintenance ownership program." The Union further asserts that after this vote it informed the Employer that the reasons for the strike were the Employer's unfair labor practices. The Union then went out on strike. The picket signs said either "on strike" or "unfair to labor," but were later changed to the "unfair" variety.

For its part, the Employer denies that it was informed, at any time prior to January 3, 1996, that the cause of the strike was its alleged unfair labor practices.

In fact, the Employer notes that at the last meeting before negotiations broke off on July 7, 1995, in response to the Employer's query as to what it would take to end the strike, the Union presented the Employer with a list of 10 or 11 financial items, including a "demand for triple time, a general wage increase, severance benefits, maintenance of benefits for terminated employees for a period of time, and a ten percent penalty against the Employer every time a paycheck had an error in it." During this presentation, the Union did not refer to information requests not being complied with or the implementation of the maintenance ownership program.[1]

On July 10, 1995, the Union filed a charge in Case 21-CA-30802 alleging, inter alia, that the Employer directly dealt with employees at plant steward meetings regarding the contract extension, and on July 26, 1995, the Employer filed a charge in Case 21-CB-11973, alleging that the Union refused to bargain in good faith, in violation of Section 8(b)(3). These charges were dismissed in their entirety on August 31, 1995. The charge in Case 21-CA-30802 was dismissed in part because the Union through its steward had actually participated in these alleged discussions with employees and the steward had in fact made a counterproposal with regard to the contract extension. Moreover, when the Company official was told at a May 11, 1995, plant steward meeting that it was inappropriate to discuss contract extension in this forum, the evidence available at this time established that he no longer pursued the issue directly with employees. The charge in Case 21-CB-11973 which alleged that the Union had failed to provide information, had engaged in dilatory bargaining tactics, had refused to bargain about specific topics, had refused to hold a membership vote on the Employer's final contract proposal, and had threatened to engage in secondary activity, was dismissed on the grounds of

[1] Further, the Employer states that from the beginning of the strike on July 1, 1995 until January 3, 1996, the Union president had written 11 letters to the Employer and in none of these letters did the Union ever contend that the strike was motivated by factors other than economic considerations. The employees also signed a petition addressed to the Employer, and dated June 31 [sic], 1995, which stated, "We at GS Roofing Local 26 Do not wish to extend contract/NO CONTRACT NO WORK."

insufficient evidence. With regard to the allegation that the Union engaged in dilatory bargaining tactics, the Region concluded, "the evidence establishes that negotiations were lengthy and involved and no evidence of an intent to frustrate negotiations is shown."

However, on September 29, 1995, the Region issued a complaint in Cases 21-CA-30760 and -30791, attacking the implementation of the "maintenance ownership program" and the refusal to provide information about the current job descriptions. At this point, the Region had not received any evidence from which to conclude that the strike was an unfair labor practice strike.

Cases 21-CA-30912, 30953, 30978, & 21-CB-12011 (Second Series of Charges)

In the meantime, the Union had insisted on meeting before a mediator. The first such meeting was held on August 9, 1995, at the Federal Mediation and Conciliation Service (FMCS) office. The Union did not leave its assigned room during this meeting and there were never any face-to-face meetings between the parties; instead, the Union relayed questions for the mediator to ask the Employer about modification of the Employer's position. Following this meeting, the Employer sent the Union a new bargaining proposal dated September 8, 1995. On September 19, 1995, the Union filed a new charge against the Employer, in Case 21-CA-30912, alleging surface bargaining and regressive bargaining, including the September 8 offer.

On September 27, 1995, the Employer filed a charge in Case 21-CB-12011, alleging, among other things, that the Union was refusing to bargain in good faith and was maintaining an intransigent bargaining position in violation of Section 8(b)(3) of the Act. The Company alleged that the Union was making frequent demands for information to which the Union was entitled but that was not readily available and was arriving late and unprepared to meetings.

On October 10, 1995, the parties again met at the FMCS offices. The Employer asked for a response to its September 8 proposal but the Union stated that it could not respond until it asked some questions. Prior to this meeting the Employer had begun permanently replacing employees, so the

Union asked about the number of replacements and who had been replaced. There was no evidence that the Union objected to the hiring of these permanent replacements. The Employer responded to the Union that it had replaced five employees. The Union also asked the Employer if the "maintenance ownership program" (over which complaint had already issued) was in effect. The Employer insisted that the "maintenance ownership program" had ceased, but the Union demanded that it be allowed to visit the plant so that it could be assured that it had ceased. The Employer agreed to allow the Union to visit the plant, but the Union never visited the plant.

On October 12, 1995, the Union filed another charge against the Employer in Case 21-CA-30953, alleging bad faith bargaining, unlawful implementation of a last and a final offer, and refusal to provide information. On October 25, 1995, the Union filed a charge in Cases 21-CA-30978 and resurrected the direct dealing charge already dismissed by the Region in Case 21-CA-30802. However, in this instance the Union [*FOIA Exemptions 6, 7(C) and (D)*] Employer representatives had spoken to them in June 1995, in safety and crew meetings and in one-on-one discussions about the contract extension.

At a negotiations session on November 7, 1995, the Employer informed the Union that 37 permanent replacements had been hired. Again, there was no evidence that the Union objected.

On February 26, 1996, the Region dismissed all of the above then outstanding charges in their entirety. With regard to the charge in Case 21-CA-30912 alleging that the Employer was engaged in surface bargaining and regressive bargaining, including the September 8 offer, the Region concluded that there was insufficient evidence to establish such a violation and specifically that the mere fact that the September 8 proposal might not be to the Union’s liking would be insufficient to establish a violation since the Employer was "free to offer new and different proposals during the strike (which it did not initiate), without violating the Act." The Region further concluded that there was no evidence to refute the Employer’s claim that it had not implemented its final offer, and thus dismissed the charge in Case 21-CA-30953. The Region dismissed the charge in Case 21-CA-30978 which had alleged that the Employer directly dealt with employees regarding the

contract extension in June 1995, stating that the evidence showed that the Employer had been involved in contract extension conversations with the Union President in May 1995, that the Union had waited four months to present the alleged new evidence from these employee witnesses without explanation, and that the Union stewards who were present when these alleged contacts had been made failed to present evidence regarding them. Moreover, the Union raised no objections to this conduct while negotiating with the Employer in June so that any misconduct was negligible and/or waived.[2]

With regard to the charge against the Union in Case 21-CB-12011, the Region dismissed this charge largely because the Employer had yet to provide the information which was the subject of the 8(a)(5) allegation in the complaint issued in Case 21-CA-30791, and in such circumstances a bad faith bargaining violation by the Union could not be found.

At this point, the Region had not received any evidence from which to conclude that the strike was an unfair labor practice strike.

Cases 21-CA-31212, 31240 and 21-CB-12130 (The Instant Charges)

The Employer had informed the Region in September 1995, and again in early February 1996 that it had already ended the maintenance ownership program and would provide the Union with the requested information, thus responding to the charges which formed the basis of the complaint

[2] The Region further noted the existence of a May 12, 1995 memorandum from the Company to the Union which demonstrated that the Company, by proposing a contract extension for more than one year, was responding to an offer made to it by a Union steward. That memorandum also showed that the Company was simultaneously bargaining with the Union president over a contract extension in May before June 1995 contract negotiations had begun. The Union had promised to provide this memorandum but ultimately did not. The Employer provided the memorandum to the Region. Further, the Region also characterized as "conspicuously absent" as a witness the chief steward who gave the May 12 memorandum to the Union.

issued in Cases 21-CA-30760 and -30791. The Employer signed a settlement agreement in those cases on February 16, 1996, and initialed the prepared notice, which stated that it had ended the maintenance ownership program.

As noted above, on February 26, 1996, the Region dismissed the charges in the second series of charges in their entirety. On that same date, in a telephone conversation with the Region, the Union for the first time claimed that the strike was an unfair labor practice strike.

On March 4, 1996, the Union sent the Employer two letters. One stated, "the Union hereby advises you that the employees offer unconditionally to return to work. This offer is effective immediately"; the other stated, "This is to demand that the Employer terminate all the replacement workers that were hired during the strike." On March 7, the Union filed a charge in Case 21-CA-31212, which alleged among other things that the Employer violated the Act by unlawfully replacing striking employees. Sixty-five employees had initially gone on strike. On March 8, the Employer gave the Union a list of ten employees for whom openings existed at the Employer. The ten employees reported to work on March 11, 1996, replacing 15 temporary employees.

The charge in Case 21-CA-31240 was originally filed on March 19, 1996, and amended on April 18 and May 9, 1996, and alleges that the Employer continues its refusal to displace replacement workers following the Union's unconditional offer to return. The charge in Case 21-CB-12130 was filed on May 9, 1996, and alleges that the Union failed and refused to bargain in good faith with the Employer in violation of 8(b)(3) of the Act.

With regard to Charges 21-CA-31212 and -31240, the Union [*FOIA Exemptions 6, 7(C) and (D)*] asserted that the strike was motivated by the Employer’s failure to provide information regarding the then current job descriptions and that the strike was not over economic issues. In July 1996, the Region initially concluded that there was not sufficient evidence upon which to conclude that the employees were engaged in an unfair labor practice strike. Sometime in July 1996, the Union president discovered bargaining notes and notes of the July 1, 1995, membership meeting which supported the Union’s allegation

that two secret ballot votes were taken at the July 1 meeting, including a unanimous vote to go out on an unfair labor practice strike because the Employer had failed to provide information and because the Employer had unilaterally implemented the "maintenance ownership program." These notes were provided to the Region sometime after July 31, 1996, and although they support the proposition that the ULP's were discussed in general at the July 1 meeting, the notes did not conclusively corroborate the Union [*FOIA Exemptions 6, 7(C) and (D)*] had explained the ULP's to the employees and that there had been a specific unfair labor practice strike vote. On September 6, 1996, the Region concluded that in these circumstances and where there was no other evidence in any correspondence between the Union and the Employer wherein the Union had ever contended--in the six months following the commencement of the strike--that the strike was anything other than an economic strike, the evidence was still insufficient to establish the strike was an unfair labor practice strike.

Subsequent to this determination, the Union [*FOIA Exemptions 6, 7(C) and (D)*] Union's positions that an unfair labor practice vote was taken at the July 1, 1995, meeting, and that the Union immediately informed the Employer that the reason for the strike was its failure to provide job descriptions and its unilateral implementation of the maintenance ownership program. The Union also provided the Region with various documents regarding the Union's support of the unemployment claims of its members. In these materials, the Union had maintained that the employees voted to protest the unfair labor practices of the Employer and that the employees walked out over the unfair labor practices of the Employer.

With regard to the charges in Case 21-CB-12130, the Region concluded in July 1996, that the Union had unlawfully refused to provide information regarding the duties of its chief steward and that it had bargained in bad faith by failing to even state its position regarding the Employer's September 8 proposal. In so concluding, the Region noted that it had earlier considered a similar charge in the second series of charges noted above and had dismissed that charge because the Employer had failed to provide the Union with relevant information, but by the time this last series of charges were investigated the

Employer had supplied the information. However, the Region dismissed the allegation that the Union was engaged in dilatory bargaining tactics.

Subsequent to this determination, the Employer asked the Region to reconsider its dismissal of the allegation that the Union is engaging in dilatory and delaying bargaining tactics. In that regard, the Employer noted it had presented the Union with its health insurance proposal in October 1995. In requesting reconsideration, the Employer pointed to an extremely detailed information request dated July 3, 1996, nearly eight months after the Employer had first presented its proposal, wherein the Union requested information regarding the Employer's health care proposals, including information regarding each of the physician and/or health and dental care providers listed in three voluminous provider directories issued by health insurance companies. For example, the Union seeks an "item by item comparison of all benefits and services provided by each benefit provider." The Employer noted that in a publication entitled "Offensive Bargaining" that was written by the Union's attorney, unions are advised to utilize information requests to prolong and frustrate the bargaining process and to cause employers to commit unfair labor practices and thereby have strikes declared unfair labor practice strikes. Thus, the Region requested advice regarding whether the Union's request for information constitutes bad faith bargaining under Section 8(b)(3) of the Act.

ACTION

We conclude that the strike should be alleged as an unfair labor practice strike notwithstanding the fact that the Union has only recently contended to the Region that it was conducting an unfair labor practice strike. We further conclude, in agreement with the Region, that the Union has made an unconditional offer to return to work. We also conclude that the Union's information request does not constitute bad faith bargaining.

1. The Nature of the Strike

Under established Board law, an unfair labor practice strike is a strike precipitated at least in part by an

employer's unfair labor practice,[3] i.e., if an unfair labor practice "had anything to do with causing [it]."[4] The fact that a strike was prompted in part or even primarily by economic issues does not preclude a finding that unfair labor practices were a contributing factor in the decision to strike.[5] In determining whether a strike is an unfair labor practice strike, one should not ascertain whether the strike would have occurred "but for" the unfair labor practices.[6]

In making a determination regarding strike causation, the Board has paid special attention to statements made during strike vote meetings; generally, if the unfair labor practices were discussed meaningfully at this meeting, they are considered to have been at least a partial cause of the strike.[7] The Board has also ascribed importance to the

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[3] California Acrylic Industries, d/b/a Cal Spas, 322 NLRB No. 10, ALJD slip op at 16 n. 50 (1996); I.W. Corp., 239 NLRB 478 (1978).

[4] Decker Coal Co., 301 NLRB 729, 746 (1991), citing Teamsters Local 662 v. NLRB, 302 F.2d 908, 911 (D.C. Cir. 1062).

[5] I.W. Corp., 239 NLRB at 478; Head Division, AMF Inc., 228 NLRB 1406 (1977), enfd. 593 F.2d 972 (10th Cir. 1979); Larand Leisurelies, Inc., 213 NLRB 197 (1974), enfd. 523 F.2d 814 (6th Cir. 1975); Gourmet Foods, 270 NLRB 578, 610 (1984).

[6] See Decker Coal, 301 NLRB at 746, quoting as follows from Northern Wire Corp. v. NLRB, 887 F.2d 1313 (7th Cir. 1989):

> Wright Line [251 NLRB 1083 (1980), enfd, 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982)] does not provide the applicable standard in assessing strike causation. The dispositive question is whether the employees, in deciding to go on strike, were motivated in part by the unfair labor practices committed by their employer, not whether, without that motivation, the employees might have struck for some other reason. (emphasis in original).

[7] Page Litho, 311 NLRB 881, 891 (1993) (unfair labor practice strike found even though employees had rejected employer's contract proposal, where union informed

strikers' representations of their purpose through the messages conveyed on picket signs.[8] However, the fact that a union does not refer to unfair labor practices in discussions with or proposals to the employer does not mean a strike was not caused in part by unfair labor practices.[9] Finally, although the Board has acknowledged that, because of the greater protection accorded unfair labor practice strikers, it is in a union's interest to portray a strike as an unfair labor practice strike, the Board has refused

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employees of unfair labor practices in pre-strike meeting and where picket signs announced unfair labor practices); Massachusetts Coastal Sea Foods, 293 NLRB 496 (1989); North American Coal Corp., 289 NLRB 788 (1988); I.W. Corp., 239 NLRB at 478 (discussion of unfair labor practices at pre-strike meeting demonstrated they were a contributing factor in decision to strike); Larand Leisurelies, 213 NLRB at 197 (that unfair labor practices were discussed in meeting where strike vote taken demonstrates that they were a factor, despite other larger issues).

Compare Burner Systems International, 273 NLRB 954 (1984) (economic strike where there was only passing reference at pre-strike meeting to employer's failure to provide financial information, no questions or discussion regarding it, and decision regarding whether to strike was framed solely in terms of acceptance or rejection of the employer's last contract proposal); Tufts Brothers, Inc., 235 NLRB 808 (1978) (economic strike, despite discussion of several non-bargaining related unfair labor practices at the pre-strike meeting, where the strike occurred on a pre-arranged cut-off date tied to lack of progress in negotiations).

[8] Page Litho, 311 NLRB at 889 (unfair labor practices protested on picket signs); R & H Coal Co., 309 NLRB 28 (1992), enfd. 16 F.3d 410 (4th Cir. 1994) (same). Compare Burner Systems, 273 NLRB at 954, n. 1 (in finding economic strike, significant that all picket signs said, "on strike for fair wages").

[9] See Head Division, AMF, 228 NLRB at 1417-1418 (finding unfair labor practice strike despite union's admission that it would have settled its dispute with the employer, without resolution of the unfair labor practices, if the employer had accepted one of its economic proposals).

to consider a union's recognition of this strategic advantage as a factor in determining whether alleged unfair labor practices were a cause of the strike.[10]

In sum, in order for a strike to be an unfair labor practice strike, the motive or causation of the strike is determinative. Therefore, while the union need not inform the employer that it is engaging in an unfair labor practice strike, there must be evidence that the motivation for the strike is employer conduct which itself is alleged to be an unfair labor practice.

Here, while the evidence initially in the Region's possession after the investigation of the first and second series of charges reflected that the employees were on an economic strike, as noted above, the fact that a strike was prompted in part or even primarily by economic issues does not preclude a finding that unfair labor practices were a contributing factor in the decision to strike. Thus, the Union never informed the Region during the earlier investigations of Cases 21-CA-30760, -30791, -30802, -30912, -30953 and -30978, that it was engaged in an unfair labor practice strike. Such an omission on the Union's part is not inconsistent with its subsequent allegation in the charge filed on March 7, 1996, in Case 21-CA-31212, after it had made its unconditional offer to return to work, that the Employer had violated the Act by permanently replacing unfair labor practice strikers. Moreover, the fact that the Union initially provided insufficient evidence to establish that the walk-out was caused, at

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[10] See North American Coal, 289 NLRB at 788, n. 4 (finding unfair labor practice strike where information unlawfully withheld was relevant to key issue in bargaining, unfair labor practice was discussed at pre-strike meeting, and union official said that strike would be an unfair labor practice strike).

Cf. R & H Coal, 309 NLRB at 28 (fact that union employed strategy of waiting 13 months after commission of unfair labor practices before striking, in order to prevent strike from having spillover effects at another company, did not undercut union's claim that it was an unfair labor practice strike, where unfair labor practices were still unremedied, union claimed it was striking over them, and picket signs referred to them).

least in part, by the Employer's unfair labor practices, does not negate the [*FOIA Exemptions 6, 7(C) and (D)*] and the contemporaneous documentary evidence ultimately offered which is consistent with the Union's assertion that a specific unfair labor practice strike vote was taken on July 1, 1995. Consequently, we conclude that the evidence submitted, albeit belatedly, that the employees voted unanimously to go out on an unfair labor practice strike, is sufficient to establish an unfair labor practice strike.[11]

In concluding that the instant strike is an unfair labor practice strike, we are mindful of the Union's hard bargaining techniques, and the fact that the Region has concluded that Union failed to bargain in good faith by failing to provide relevant information and by failing to state its position on the Employer's September 1995 proposal. There is also some evidence from which to infer that the Union's conduct is informed by a pamphlet prepared by its attorney entitled "Offensive Bargaining." This booklet advises, among other things, "trapping an employer into committing an unfair labor practice is a critical strategic weapon in any contract campaign." Another section advises the union to serve intrusive and burdensome information requests on an employer to avoid bargaining to impasse. Here some of the Union's conduct seems to be consistent with tactics recommended in the booklet. Thus, the Union here has demonstrated a propensity to serve detailed information requests to file and refile repetitious charges, and to fail to respond to the Employer's proposals. Moreover, when the Union insisted in bargaining that the Employer allow it to visit the plant so that it could satisfy itself that the "Maintenance Ownership Program" was no longer in operation, and the Employer eventually acceded to that demand, the Union never followed up and visited the plant. Also, although the Union was aware from October 10, 1995, that the Employer was hiring permanent replacements, the Region has no

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[11] Compare DeMuth Electric, Inc., 316 NLRB 935 (1995) (employee never explained why he was on strike); Gibson Greetings, Inc., 310 NLRB 1286 n.5 (1993) (Board declined to find that employer letter about replacements converted economic strike to unfair labor practice strike in absence of evidence that employees or newspaper articles suggested that letter contributed to length of strike.)

evidence that the Union objected to this hiring until the charge was filed in Case 21-CA-31212 in March 1996. Nonetheless, these circumstances are insufficient to justify administratively rejecting the Union's dispositive evidence as fraudulent or manufactured.[12]

Our conclusion that the strike is an unfair labor practice strike is not altered by the fact that during the investigation of the second group of charges in Cases 21-CA-30912, -30953, and -30978, the Regional Office told the Employer that the Union had not at any time claimed that the strike was an unfair labor practice strike. In this regard the policies of the Act will not be furthered by failing to consider the Union's claim that it is engaged in an unfair labor practice strike because of the Employer's alleged reliance on an assertion by the Board agent that the Union had not claimed it was engaged in an unfair labor practice strike. First, as noted above, several Union officials testified that the Union president had, from the strike's inception, informed the Employer that the employees had struck because of the Employer's unfair labor practices. Thus, there is a factual dispute as to whether or not the Employer actually relied on the information provided by the Region. Next, what the Board agent

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[12] See G.C. Memorandum dated March 5, 1976, on credibility resolutions. The General Counsel will resolve credibility disputes against the charging party "only when documentary or other objective evidence is the basis." Here, of course, all of the evidence that was ultimately supplied, including the documentary evidence, is consistent. Moreover, the mere fact that the Union attempts to portray the nature of this strike as an unfair labor practice strike, as noted above, should not be a factor in evaluating whether this is an unfair labor practice strike.

Cf. American Geri-Care, 278 NLRB 676, 678-680 (1986) (administrative law judge discredited unrebutted testimony of union president where there was no documentary evidence to support that testimony which the ALJ found to be inherently not credible. "An aura of fantasy seems to envelop the evidence proffered by the Union officials...., I have the distinct impression that I have been treated by these accounts to a charade or some other form or exhibition").

actually told the Employer was the state of the record at the time the Employer questioned him, a fact, and not a legal analysis.[13] Indeed, whether or not a strike is an unfair labor practice strike is an ultimate legal conclusion neither party can reach before adjudication. Thus, it is inappropriate to disregard the Section 7 rights of employees as unfair labor practice strikers, where the Board agent merely advised the Employer as to the state of the investigatory record at a point when the Union had not claimed to the Region that it was engaged in an unfair labor practice strike.

2. The Union's Offer to Return to Work

Next, we agree with the Region that the Union made an unconditional offer to return to work in its March 4, 1996, letter stating, "the Union hereby advises you that the employees offer unconditionally to return to work. This offer is effective immediately." We note that the Union sent another letter on the same day, stating, "This is to demand that the Employer terminate all the replacement workers that were hired during the strike." The Union never claimed that the employees would not return to work absent the termination of the replacements, and in fact, employees did return to work and the Employer accepted them without terminating the replacements. Moreover, an offer to return to work which is made contingent on the discharge of replacements, where the strikers are entitled to displace those replacements, constitutes an unconditional offer to return.[14] Thus, since the strike is an unfair

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[13] While the Pleading Manual, Section 600.1(b) fn. 1, requires that the Region plead the status of a strike as an unfair labor practice strike, even though a respondent has not discriminated against any of the strikers by discharging or refusing to reinstate them, the Region's complaint in Cases 21-CA-30760 and -30791 contained no such allegation because there was no evidence when the complaint was issued that this strike was a ULP strike.

[14] See Hansen Bros. Enterprises, 279 NLRB 741 (1986) (Union's demand made on behalf of economic strikers to displace temporary replacements does not make an offer to return conditional. Rather, "an offer to return which demands no more than discharge of those replacements is perfectly appropriate.")

labor practice strike, the Union was entitled to request that the Employer displace any permanent replacements. Therefore, the Union's letters constituted an unconditional offer to return to work.

3. The Union's Information Request

The Region has also submitted the issue of whether the Union's extremely detailed information request regarding the Employer's health care proposals could constitute bad faith bargaining in violation of Section 8(b)(3) of the Act. In its July 3, 1996, letter the Union seeks information regarding each of the physician and/or health and dental care providers listed in three voluminous provider directories. For example, the Union seeks in number one of nine enumerated requests, an "item for item comparison of all benefits and services provided by each benefit provider."

Most of the information sought by the Union in response to the Employer's proposed change in the employee health care plan is presumptively relevant.[15] Number three of the Union's request seeks information as to whether each provider in each directory has "implemented a 'team' concept for staff, medical and support personnel and the administration of health care and services throughout any or each of the aforementioned providers' facilities or out sourced facilities." The request does not define "team" concept, and without such a definition it is not at all clear that this information is relevant to the bargaining unit and that the Employer must provide his information.

The Employer asserts that answering any or all of these request for hundreds or perhaps thousands of provider facilities may prove burdensome. Nonetheless, the Board has found that the burden in time and money necessary to fulfill a request for information is not a basis for refusing the request. Allocation between the employer and the union of the costs of this burden is a matter appropriate for the compliance stage. Wachter

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[15] Medical insurance benefits, their levels of coverage, and health plan carriers are mandatory subjects of bargaining . See Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Company, 404 U.S. 157, 159 (1971); Aztec Bus Lines, 289 NLRB 1021, 1037 (1988).

Construction, 311 NLRB 215, 216 (1993) (it is not uncommon for such requests to involve a large number of documents and to demand a substantial effort by the employer); Electrical Energy Service, 288 NLRB 925 n.1 (1988). Thus, instead of refusing to furnish the information on the ground that it is too burdensome, an employer is obligated to bargain with a union about whether the union will help it with a burdensome expense or will be satisfied with less and accordingly cheaper information.[16]

The Employer also asserts that the Union's information request constitutes bad faith bargaining. A party's information request must be made in good faith. Although an employer need not comply with an information request where the sole purpose for the request is to harass the employer, the Board has held that the good-faith requirement will be satisfied where any of the union's reasons for seeking the information can be justified.[17] Moreover, a union is presumed to be acting in good faith when it requests information from an employer until the contrary is shown.[18] Thus, bad faith is an affirmative defense that must be pled and proved by respondents.[19]

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[16] Pratt & Lambert, Inc., 319 NLRB 529, 534 (1995); Tower Books, 273 NLRB 671-72 (1984).

[17] Hawkins Construction Co., 285 NLRB 1313, 1314 (1987), enf. denied on other grounds 857 F.2d 1224 (8th Cir. 1988), citing Associated General Contractors of California, 242 NLRB 891, 894 (1979), enfd. as modified 633 F.2d 766 (9th Cir. 1980), cert. denied 452 U.S. 915 (1981), and, generally, W. L. Molding Co., 272 NLRB 1239, 1241 (1984). See also Wachter Construction, Inc., supra, 311 NLRB 215 (1993), enf. den. 23 F.3d 1378, 145 LRRM 2193, 2199 n. 8 (8th Cir. 1994) (The court disagreed with the standard, described above, the Board applied to determine what constitutes bad faith in the context of a request for information, and held that the proper standard was whether, under all surrounding facts and circumstances, the predominant purpose of the party making the request was one of bad faith.)

[18] Hawkins Construction, supra, 285 NLRB at 1314, citing O&G Industries, 269 NLRB 986, 987 (1984).

[19] Hawkins Construction, supra, 285 NLRB at 1322 n. 20.

Here, while the Union's information request may prove to be burdensome, that fact alone does not establish bad faith on the Union's part in requesting this information. Nor does the lack of demonstrated relevancy for item three, concerning providers' uses of teams, establish bad faith either as to that item or to the entire request. We note the argument that the Union's request was consistent with tactics suggested in its attorney's pamphlet, "Offensive Bargaining." However, in our view, there is insufficient evidence to establish any bad faith in the Union's July 3 request, particularly in light of the relevancy of the resquested information to the Employer's proposed changes in health insurance. In all these circumstances, we would not find that the Union's purpose in requesting, presumptively relevant information regarding the Employer's proposed alternatives to the current health care plan was to harass the Employer. Thus we would find no merit to this Section 8(b)(3) charge.

In conclusion, there is sufficient evidence currently in the record to conclude that the strike that began on July 1, 1995, was an unfair labor practice strike from its inception, and that the Union's March 4, 1996, offer to return to work constituted an unconditional offer to return to work. However, there is insufficient evidence to establish that the Union's July 3, 1996, information request was made solely to harass the Employer in violation of Section 8(b)(3).

B.J.K.